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JOSEPH F. SPANIOL, JR.

NO. 88-746

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

HENRY ADAMS, ET AL.,
Petitioners

v.

THE BUDD COMPANY, ET AL.,
Respondents

BRIEF OF RESPONDENT THE BUDD COMPANY IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. WHETHER THIS IS THE APPROPRIATE CASE TO RESOLVE THE CONFLICT BETWEEN THE SEVENTH CIRCUIT COURT OF APPEALS AND OTHER CIRCUIT COURTS OF APPEAL REGARDING WHETHER A UNION THAT ACTS PERFUNCTORILY IN THE HANDLING OF A GRIEVANCE BREACHES ITS DUTY OF FAIR REPRESENTATION UNDER SECTION 301 OF THE LABOR-MANAGEMENT RELATIONS ACT?

2. WHETHER THE SEVENTH CIRCUIT COURT OF APPEALS CORRECTLY DECIDED THAT THE PETITIONERS' COMPLAINT WAS NOT TIMELY CONCERNING CLAIMS THAT AROSE BETWEEN 1982 AND 1984?

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OPINIONS BELOW

The Order of the United States Court of Appeals for the Seventh Circuit denying petitioners' Petition for Rehearing is reported at 846 F.2d 428. The Judgment and Opinion of the United States Court of Appeals for the Seventh Circuit is reported at 846 F.2d 428, 128 LRRM (BNA) 2387, and 109 Lab.Cas.(CCH) ¶10488.

The Order of the District Court denying petitioners' Motion to Amend and/or Alter Judgment is not reported. The Judgment and Order of the United States District Court for the Northern District of Indiana is reported at 125 LRRM (BNA) 3208 and 109 Lab.Cas.(CCH) ¶10706.

The Order of the United States District Court for the Northern District of Indiana dismissing the Complaint as to ten petitioners against Respondent International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW and its Local No. 1122 (the "Union" or "UAW") dated August 21, 1986 is not reported. The Order of the District Court dated September 23, 1986 denying petitioners' Motion to Amend and/or Alter Judgment dismissing the Complaint against Respondent UAW as to ten petitioners is not reported.

COUNTERSTATEMENT OF THE CASE

The Budd Company[1] (hereinafter "Budd" or "the Company") is a manufacturer of automobile and truck body parts. At the time of the events at issue in this case, Budd operated two plants in Philadelphia, and other plants in Tennessee, Michigan and Ohio. Until November 1982, Budd also operated a plant in Gary, Indiana, which was closed due to business conditions. The 30 petitioners[2] in this action were permanently laid off from Budd's Gary plant between 1979 and 1980.

The International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW and its Local No. 1122 (hereinafter collectively referred to as the "UAW" or "the Union") represented the employees at Budd's Gary plant. The following four agreements between Budd and the UAW set forth the rights of Gary employees to jobs at other Budd plants: a National Production and Maintenance Agreement; a local supplemental agreement; the July 27, 1982 letter agreement on preferential hiring; and a plant closing agreement negotiated in October 1982.

As the Seventh Circuit recognized, these agreements provided only limited rights to jobs at other Budd plants. The agreements provided "preferential hire rights" to jobs at the remaining Budd plants only to laid off Gary employees who were "seniority employees." A Gary employee was a "seniority employee" for only as long as he retained seniority rights, which was for a maximum of five years after date of layoff, or for a period equal to total seniority, whichever was less.

Furthermore, laid off Gary seniority employees did not have absolute preferential hiring rights. In order to be hired

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1. The list of corporate affiliations of The Budd Company is as follows: The Budd Company is a wholly owned subsidiary of Thyssen A.G. of Duisberg, West Germany.

2. Robert Walker, a plaintiff in the case below, is not a petitioner.

for open positions, seniority employees had to file a Budd application and meet the respective Budd plant's "local plant hiring eligibility requirements." By the terms of the July 27, 1982 letter agreement, Budd retained the absolute right to establish the local plant eligibility standards and to reject employees on the basis of those standards.

The agreements' terms also obligated Budd to: 1) maintain a personnel office in the Gary area for at least twelve months after the Gary plant's closing; 2) post job openings at that personnel office for other plants covered by the National Agreement; 3) make available Budd applications at the personnel office to employees who retain seniority rights under the agreement; and 4) allow seniority employees to apply for open jobs at other plants through the mail using those application forms, rather than having to apply in person. These special provisions, which facilitated the preferential hiring application process at the surviving Budd plants, expired when Budd closed its Gary area personnel office in July 1984 (having kept the office open seven months longer than required).

In November 1982, with the closing of the Gary plant imminent, the Union held an open meeting with its Gary plant membership. The Union publicized the meeting at the Gary plant, the local union hall, and in the local newspaper. Approximately 2,000 of the 3,000 Union members attended the meeting, at which Union officials discussed the employees' limited preferential hiring rights and distributed copies of the plant closing agreement.

Between 1982 and mid-1984, approximately 550 former Gary employees, including most of the petitioners, submitted applications for openings at the surviving Budd plants. Budd plants hired approximately 160 of those preferential hire applicants, but none of the petitioners.

In February 1984, a group of laid off employees formed "The Committee of Former Budd Employees" (hereinafter

"the Committee"). All 30 petitioners are members. At that time, the Committee members wrote UAW President Owen Bieber to express their dissatisfaction concerning the Union's efforts regarding the failure of its members to obtain employment with Budd. On March 9, 1984, Bieber advised the Committee by letter that he referred the Committee's charges to the UAW-Budd department for investigation. That letter crossed in the mail with the Committee's March 7, 1984 letter to UAW Regional Director Dallas Sell, which sought assistance concerning the recall and relocation practices at Budd's Philadelphia plant.

Thomas Rodgers, the International Representative assigned to the Union's Budd department, investigated the Committee's complaints in March and April of 1984. Rodgers contacted the Company and sought the reasons and records concerning its plants' rejection of employment of the 24 then known Committee members. Budd forwarded to Rodgers the Gary plant disciplinary and attendance records of these Committee members. Budd advised Rodgers that it rejected the Committee members for preferential hire because their Gary plant disciplinary and/or attendance records did not meet the local hiring standards of the Budd plants to which they applied. On April 10, 1984, Rodgers wrote the Committee that he investigated Budd's refusal to hire them and that he was enclosing their Budd personnel records which contained information on why it denied them jobs. Rodgers requested that the Committee contact him if it had "any further questions."

Rather than request the UAW to file a grievance, contest the contents of their personnel records, or utilize the UAW's internal union appeals procedure, the Committee responded to Rodgers' April 10 letter by filing two sets of unfair labor practice charges against both the Union and Budd. The National Labor Relations Board's Regional Director dismissed both sets of charges. In the Regional Director's October 30, 1984 dismissal letter of the second group of charges, he found:

> [T]he investigation failed to disclose sufficient evidence to establish that the Union's reasons for not pursuing such formal grievances were arbitrary, capricious, or invidious.

In February 1985, the petitioners sought again to apply for preferential hire at the surviving Budd plants, but this time by means of letters, rather than through formal Budd applications. By this time Budd no longer accepted mailed applications for preferential hires. Moreover, Budd never accepted letter applications instead of its own application forms. By February 1985, 14 of the petitioners had also lost their seniority rights by operation of the collective bargaining agreements. Once these petitioners lost their seniority rights, they lost their right to grieve or assert a breach of contract.

Not having received a response from Budd, the Committee requested in April 1985 that the Union file grievances concerning its members' failure to obtain employment. Rodgers declined to pursue such grievances because he thought the petitioners' February 1985 "applications" were *both* untimely and without merit. Rodgers based his conclusions on the language of the bargaining agreements, his investigation of similar complaints one year earlier, and the passage of time.

Petitioners filed their Complaint on June 17, 1985. At the close of discovery, both the Union and Budd successfully moved for Summary Judgment on several grounds. The District Court did not address some of these grounds, but concluded:[3] 1) the statute of limitations had run on petitioners' claims involving the Union's failure to grieve or arbitrate Budd's refusals to hire them at other plants from 1982

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3. On August 15, 1986, the District Court dismissed the claims of ten petitioners against the Union for failure to respond to interrogatories. The ten petitioners are Howard Donald, Lillie Donald, Carolyn Gilbert, Curtis Humphrey, L. M. Jackson, Leon Kennedy, Bennie Kennedy, Ronald Legett, Melvin Montgomery, and Jerome Nedoff. The petitioners did not timely appeal this dismissal to the Seventh Circuit.

through 1984; 2) although petitioners' complaint timely contested the Union's failure to grieve Budd's February 1985 denials of preferential hire, 14 petitioners had no standing to contest that denial against either Budd or the Union since they were no longer seniority employees of Budd, and therefore not covered by the collective bargaining agreement;[4] and 3) the remaining petitioners could not pursue their breach of contract claim because they could not prove that the Union breached its duty of fair representation. The Seventh Circuit affirmed the District Court's findings.

REASONS FOR DENYING THE WRIT

I. THIS IS NOT THE APPROPRIATE CASE TO REVIEW THE SEVENTH CIRCUIT'S STANDARD FOR LIABILITY FOR BREACH OF THE DUTY OF FAIR REPRESENTATION BECAUSE APPLICATION OF A DIFFERENT STANDARD WOULD NOT PRODUCE A DIFFERENT OUTCOME

The petitioners ask this Court to resolve the conflict in the circuit courts on the appropriate standard for determining whether a union has breached its duty of fair representation.[5] Given the facts of this case, such a request is

4. The 14 petitioners are Willie Ballard, Willie Bingham, Joyce Clark, Joseph Cruz, Louis Cruz, Michael Dawson, Melvin Page, John Perkins, Willie Smith, Jerome Tyron, Alfred Volk, Robert Weems, Leroy Williams, and Milton Wilson.

5. The 14 petitioners who were not seniority employees at the time of their April 1985 grievances have no standing to seek certiorari on this question. The District Court held that the 14 petitioners had no seniority rights on February 22, 1985 when they wrote to Budd requesting employment. After their seniority expired, "these employees were no longer members of the bargaining unit and were no longer covered by the provisions of the agreement." 125 LRRM (BNA) at 3211. As a result, the District Court concluded that "these employees had no standing to assert that Budd breached the collective bargaining agreement or that the Union breached its duty of fair representation." *Id.* The District Court's holding in this regard was affirmed by the Seventh Circuit, and the petitioners do not seek certiorari on that question.

inappropriate under the Court's principle of carefully choosing the cases to be given plenary review.

In the Seventh Circuit, "mere negligence" or even "gross negligence" on the part of a union is insufficient to support an action for breach of the duty of fair representation. Employees must show instead that a union engaged in "intentional misconduct." *Hoffman v. Lonza, Inc.*, 658 F.2d 519, 522 (7th Cir. 1981); *Camacho v. Ritz-Carlton Water Tower*, 786 F.2d 242, 243 (7th Cir.), *cert. denied*, 477 U.S. 908 (1986). Although perfunctory handling of a grievance may be sufficient to establish liability in the other circuits (*see, e.g., Robesky v. Qantas Empire Airways Ltd.*, 573 F.2d 1082, 1091 (9th Cir. 1978); *Wyatt v. Interstate & Ocean Transport Co.*, 623 F.2d 888, 891 (4th Cir. 1980); and *Curtis v. United Transportation Union*, 700 F.2d 457, 458 (8th Cir. 1983)), such conduct is not sufficient to establish liability in the Seventh Circuit.

The Court should not grant the Writ since petitioners would not be entitled to a remedy under the standard of any of the other circuits. The Union's decision not to process the petitioners' grievances was not perfunctory. Rather, the Union's decision was based on a reasonable interpretation of the collective bargaining agreement.

Furthermore, the Seventh Circuit's conclusion can be affirmed on other grounds without regard to the questions raised in the Petition. First, the petitioners cannot prove that Budd breached its collective bargaining agreements with the Union by refusing to employ them in response to their February 1985 letter "applications." Second, the petitioners failed to exhaust their internal union remedies, which meet the standards set forth in *Clayton v. International Union, UAW*, 451 U.S. 679, 689 (1981). These grounds, having been raised by the UAW and Budd below, can support the Summary Judgment. *Dandridge v. Williams*, 397 U.S. 471, 475 n.6 (1970).

Thus, applying the standards of the other circuits would not change the result in this case. In the interest of the

sound administration of justice, this Court should resolve the conflict in the circuits, if at all, in a Seventh Circuit case where the Union prevailed despite its perfunctory handling of a grievance. Additionally, a matter in which a union's standard of liability is the only controlling question of law would be a more appropriate case to grant certiorari. The Court previously declined to review the Seventh Circuit's standard for determining a breach of a union's duty of fair representation in *Camacho v. Ritz Carlton Water Tower,* 786 F.2d 242 (7th Cir.), *cert. denied,* 477 U.S. 908 (1986).

A. The Union's Conduct Is Not Sufficient To Establish Liability Under the Law of the Other Circuits

The petitioners can not prevail under the more liberal standards in the other circuits for determining a breach of the union's duty of fair representation. In order to prevail in an action asserting a breach of contract, an employee must demonstrate that his employer breached the collective bargaining agreement and his union breached its statutory duty of fair representation. *Hines v. Anchor Motor Freight, Inc.,* 424 U.S. 554, 570-571 (1976). A breach of the union's statutory duty of fair representation occurs only when its conduct is "arbitrary, discriminatory, or in bad faith." *Vaca v. Sipes,* 386 U.S. 171, 191 (1967).

Employees do not have an absolute right to have their grievances taken to arbitration regardless of the provisions of the applicable collective bargaining agreement. *Vaca v. Sipes,* 386 U.S. at 191. In processing grievances, unions have been accorded a "wide range of reasonableness" in serving the unit it represents. *Ford Motor Company v. Huffman,* 345 U.S. 330, 339 (1953).

Certain uniform principles have been adopted by the courts in analyzing whether a union breached its duty of fair representation. A union is not liable for mere errors in judgment that were made in honesty and in good faith. *Ford Motor Co. v. Huffman,* 345 U.S. at 338; *NLRB v. American*

Postal Workers Union, 618 F.2d 1249, 1255 (8th Cir. 1980). Ordinary negligence, without more, cannot establish a breach of duty of fair representation. *See Ruzicka v. General Motors Corp.*, 649 F.2d 1207, 1212 (6th Cir. 1981) and cases cited therein. The simple fact that the grievances may have been meritorious does not entitle an employee to a remedy. *Vaca v. Sipes*, 386 U.S. at 191.

The circuit courts have been particularly deferential to a union's actions where its judgment and advocacy, rather than its ministerial actions, are at issue. *Dutrisac v. Caterpillar Tractor Co.*, 749 F.2d 1270, 1273 (9th Cir. 1983); *Tedford v. Peabody Coal Company*, 533 F.2d 952, 957 (5th Cir. 1976); *Bazarte v. United Transportation Union*, 429 F.2d 868, 872 (3d Cir. 1970). In this regard, Judge Reinhardt noted in *Peterson v. Kennedy*, 771 F.2d 1244, 1254 (9th Cir. 1985), *cert. denied*, 475 U.S. 1122 (1986):

> We have said that a union's conduct may not be deemed arbitrary simply because of an error in evaluating the merits of a grievance, in interpreting particular provisions of a collective bargaining agreement, or in presenting the grievance at an arbitration hearing. (Citation omitted). In short, we do not attempt to second guess a union's judgment when a good faith, non-discriminatory judgment has in fact been made. It is for the union, not the courts, to decide whether and in what manner a particular grievance should be pursued.

In the instant case, the only conduct that can be evaluated is the Union's failure to grieve petitioners' claims involving Budd's alleged violations of the collective bargaining agreement in 1985. A review of all other actions by the Union is time-barred. *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151, 171 (1983). In evaluating the Union's actions in 1985, events outside the six-month limitations period may be utilized as background. *Local Lodge No. 1424, International Association of Machinists, AFL-CIO v. NLRB*, 362 U.S. 411, 417 (1960). However, conduct within the limitations period cannot be deemed to be an unfair labor practice merely on the basis of such evidence. *Id.*

Petitioners' allegations boil down to their disagreement with the Union's interpretation of its collective bargaining agreement with Budd. Rodgers declined to file grievances in part because none of the petitioners properly applied for employment and certain petitioners had no seniority rights. Budd never accepted letters as employment applications. Likewise, by 1985, Budd no longer accepted preferential hire applications submitted by mail. By that time, the seniority rights of 14 petitioners expired. These individuals had lost their rights under the collective bargaining agreement, including the right to file grievances.

Rodgers did not believe petitioners' 1985 grievances were timely because the grievances merely sought to revive complaints about Budd's decisions made significantly more than one year earlier. By the terms of the preferential hiring appeal procedure, an employment rejection must be appealed within thirty (30) calendar days of the employees' receipt of the rejection. Petitioners knew in April 1984 that Budd had concluded they were unemployable and were aware of the reasons supporting this conclusion. Petitioners had no reasonable expectation that Budd would act differently on their February 1985 "applications."

Rodgers also declined to file grievances because he had investigated petitioners' identical claims one year earlier and concluded that, given the language of the preferential hiring letter, their claims were without contractual support. Rodgers thought the arbitration of petitioners' grievances would be futile since Budd retained the absolute right to establish local plant eligibility standards and to reject employees because of their poor Gary plant disciplinary and/or attendance records.

Rodgers performed no independent investigation of Budd's decision to reject petitioners for employment because the preferential hiring agreements permitted Budd to consider their Gary plant work history in evaluating their applications. Petitioners never offered any evidence that

Rodgers' view of the preferential hiring agreement was in bad faith. They simply disagreed with it. Furthermore, petitioners never contested the correctness of their Gary employment records that Rodgers submitted to them. Nevertheless, Rodgers would have discovered no information in a more extensive investigation that would have altered his interpretation of the contract, and thus, changed his decision not to process the grievances. *See Evangelista v. Inlandboatmen's Union of the Pacific*, 777 F.2d 1390, 1393 (9th Cir. 1985) (Union fulfilled its duty to perform minimal investigation when further investigation would not have aided in its decision not to pursue the grievance).[6]

In short, petitioners would not have prevailed if this action had been brought in a different circuit. The Union did not breach its duty of fair representation under the undisputed standards concerning a union's conduct. Rodgers' interpretation of the preferential hiring provisions of the collective bargaining agreement was reasonable and was not made in disregard of petitioners' rights.[7] The Union's agreement with Budd's interpretation of these contractual provisions is not evidence of a breach of duty of fair repre-

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6. Rodgers performed his investigation in March and April 1984. Assuming *arguendo* that the investigation did not fulfill the Union's duty of fair representation, petitioners cannot contest this conduct through their complaint filed in June 1985. *Ray Lewis v. Local Union No. 100, Laborers International Union*, 750 F.2d 1368, 1379 (7th Cir. 1984).

7. In this regard, the Seventh Circuit concluded that "taken in its best light, however, the evidence here can only support a claim of inferior representation." Although the Seventh Circuit noted that Rodgers' actions "may have been perfunctory," the Court's characterization of Rodgers' conduct clearly demonstrates that he was neither grossly negligent nor acting in bad faith. Accordingly, the Seventh Circuit uses the term "perfunctory representation" as a synonym of "inferior representation", which would not have entitled petitioners to a remedy in any circuit, rather than as a synonym for "grossly negligent representation," as have the other circuits. *E.g., Robesky v. Qantas Empire Airways Limited*, 575 F.2d at 1090; *Ruzicka v. General Motors Corp.*, 649 F.2d at 1212; and *Wyatt v. Interstate & Ocean Transport Co.*, 623 F.2d at 891.

sentation, even if the grievances were meritorious. *Moore v. Bechtel Power Corp.*, 840 F.2d 634, 637 (9th Cir. 1988); *Bazarte v. United Transportation Union*, 429 F.2d 868, 872 (3d Cir. 1970). Moreover, the Union is not liable, even if its representation was unfair or deficient, since the grievances were not timely under the collective bargaining agreement. *Ethier v. United States Postal Service*, 590 F.2d 733, 736 (8th Cir.), *cert. denied*, 444 U.S. 826 (1979).

B. The Seventh Circuit's Judgment Can Be Affirmed Without Regard to the Questions Raised In the Petition.

The Writ should also be denied because the Seventh Circuit's judgment can be affirmed on the existing record on arguments made to the courts below without reaching the questions raised in the Petition.[8] *See Dandridge v. Williams*, 397 U.S. at 475 n.6. Petitioners cannot demonstrate that Budd violated its collective bargaining agreement with the UAW in refusing to hire them in response to their February 1985 attempts to apply by mail. To prevail against the Company, the petitioners must show that Budd's failure to rehire them breached its collective bargaining agreements with the UAW. *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. at 570-571.

By February 1985, the right of Gary employees to apply at the surviving Budd plants by mail had expired. In order to be considered for employment a former Gary employee had to apply in person. None of the petitioners applied in person in February 1985 at any of the surviving Budd plants.

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8. Budd argued to both the District Court and the Seventh Circuit that Summary Judgment for it was appropriate because petitioners did not exhaust their internal union remedies and the Company did not breach the collective bargaining agreement. The Seventh Circuit concluded that petitioners did not exhaust their intra-union remedies, but declined to affirm the Judgment on this ground because the District Court made no findings on the *Clayton* elements. Neither the District Court nor the Seventh Circuit addressed the breach of contract question.

Moreover, Budd plants required a fully completed application form, and never accepted a letter as an application.

Additionally, Budd did not violate the preferential hiring provisions of the collective bargaining agreement by refusing to rehire the 14 petitioners whose seniority rights had expired. The preferential hire provisions of the Agreement only provided rights to applicants who retained contractual seniority. Moreover, those 14 petitioners had no standing to assert a breach of contract since they were no longer considered employees.

The Seventh Circuit's Judgment was also appropriate because plaintiffs failed to exhaust the internal union appeals procedure. This Court has held that exhaustion of internal union appeals is a precondition to obtaining a remedy for a union's breach of duty of fair representation if: (1) the employee can obtain a fair hearing from the Union on the claim; (2) the procedure can result in either reactivation of the grievance or otherwise provide full relief; and (3) the procedure does not unreasonably delay access to judicial remedies. *Clayton v. International Union, UAW*, 451 U.S. at 689. All of the *Clayton* elements are present in the instant case.

First, petitioners could have obtained a fair and impartial hearing through the Union's internal appeals procedure. The UAW's internal appeal procedure set forth in Article 33 of its International Constitution, provides, *inter alia:*

> Where the challenge is against an . . . international officer or department the levels of appeal are first to the International Executive Board, and then to the Convention Appeals Committee, or where appropriate to the Public Review Board.

In most cases an appeal to the International Executive Board (hereinafter "IEB") results in a hearing. At the hearing, the union member has a right to be represented by counsel, present evidence, and submit a brief. (UAW Con-

stitution, Article 33, Section 3(d)). Decisions of the IEB may be appealed to either the UAW Convention Appeals Committee or the Public Review Board. The Convention Appeals Committee, composed of delegates to the UAW's triannual convention, meets at least semiannually. (UAW Constitution, Article 33, Section 3(e)). The Public Review Board, consisting of seven individuals who are not employed by the UAW, has the authority to handle appeals from the IEB where a member alleges his grievance was improperly handled because of "fraud, discrimination or collusion with management" or that the disposition or handling of the matter was "devoid of any rational basis." (UAW Constitution, Article 33, Section 4(1)).

Petitioners presented no evidence of any hostility on the part of Union officials that would have precluded a fair hearing on their claims. Thus, the UAW internal appeals procedure could have provided a fair and impartial resolution of petitioners' complaints.

Secondly, a successfully filed intra-union appeal can cause a grievance to be reinstated to the appropriate step in Budd's contractual grievance procedure, under which the grievant would be able to seek full relief of his claim. Document No. 36 of the National Agreement provides:

> However, in those instances where the International Union, UAW, by either its Executive Board, Public Review Board, or Convention Appeals Committee has reviewed the disposition of a grievance and found that such disposition was improperly effected by the Union or a Union representative involved, the Budd Department of the International Union may inform the Company's Corporate Manager of Labor Relations in writing that such grievance is reinstated in the grievance procedure at the step at which the original disposition of the grievance occurred.

Finally, several courts have reviewed the sufficiency of the UAW internal appeals procedure and have concluded that it meets the *Clayton* requirements. *E.g., Wozniak v.*

U.A.W. Local 897, 842 F.2d 633, 636 (2d Cir. 1988); *Monroe v. International Union, UAW*, 723 F.2d 22, 26 (6th Cir. 1983), and *Miller v. General Motors Corp.*, 675 F.2d 146, 150 (7th Cir. 1982).

II. THE SEVENTH CIRCUIT CORRECTLY DECIDED THAT PETITIONERS' COMPLAINT WAS NOT TIMELY CONCERNING CLAIMS ARISING BETWEEN 1982 AND 1984.

Contrary to Petitioners' assertions, the Seventh Circuit correctly concluded that the petitioners' continuing violation theory did not support their assertions that their June 1985 Complaint could timely raise claims arising from Budd's and the Union's actions in 1982 through 1984.[9]

It is well-established that continuing violations of Section 301 of the Labor-Management Relations Act do not make alleged violations occurring six months beyond the filing of a complaint actionable. *Ray Lewis v. Local Union No. 100, Laborers*, 750 F.2d 1368, 1379 (7th Cir. 1984). Rather, continuing violations of Section 301 only toll the limitations period so that each time a violation occurs, a new cause of action accrues. *Sevako v. Anchor Motor Freight, Inc.*, 792 F.2d 570, 575 (6th Cir. 1986). As a result, alleged violations occurring beyond six months from the filing of the complaint remain time-barred. *Ray Lewis v. Local Union No. 100*, 750 F.2d at 1379; *Sevako v. Anchor Motor Freight, Inc.*, 792 F.2d at 575. For this reason, the District Court and the Seventh Circuit correctly dismissed as untimely all claims except those based upon Budd's refusal to hire petitioners following receipt of their February 1985 letter "applications."

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9. The case will be closed as to the 14 petitioners who no longer have seniority rights if this Court does not accept certiorari on petitioners' question concerning this issue, but accepts certiorari on petitioners' other question.

III. CONCLUSION

For the reasons stated above, application of the standard of liability of the other circuits for breach of a union's duty of fair representation would not change the result in this case. In the interest of the sound and efficient administration of justice, this Court should deny the Petition for a Writ of Certiorari and evaluate the conflict in the circuits, if at all, in another case.

Respectfully submitted,

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APPENDICES

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

HENRY C. ADAMS, JR., et al., Plaintiffs	:	
v.	:	CIVIL NO. H 85-556
THE BUDD COMPANY, et al., Defendants	:	

ORDER

This matter comes before the court on the Union Defendants' Motion for Protective Order which was filed on July 18, 1986; the plaintiffs' Motion for Sanctions which was filed on August 1, 1986; the plaintiffs' Motion to Shorten the Time within which Defendants UAW and the Budd Company Must Produce Documents in Response to Plaintiffs' Deposition Notices which was filed on August 11, 1986; and on the Union Defendants' Renewed Motions to Dismiss and to Compel Answers to Interrogatories which motions were filed on August 12, 1986.

I.

By their Motion for Protective Order, the union defendants seek a protective order to prevent any attempt by the plaintiffs to seek sanctions for the union defendants' failure to produce Tom Rodgers for a deposition on July 18, 1986 in Detroit, Michigan. As anticipated by the union defendants, the plaintiffs filed a Motion for Sanctions on August 1, 1986.

On June 30, 1986, the union defendants received notice of the deposition of Thomas G. Rodgers, an employee of the UAW. The notice directed Rodgers to produce documents at

the deposition on July 18, 1986. The plaintiffs also served a notice, pursuant to Fed.R.Civ.P. Rule 30(b)(6), requesting the UAW to designate a person to testify on its behalf about the contents of the documents they requested of Rodgers. Because Rodgers had not received the 30 days notice as required by Fed.R.Civ.P. Rule 34, the union defendants notified the plaintiffs' attorney that they would refuse to produce the documents at the deposition. The plaintiffs' attorney responded that he was not inclined to travel to Detroit to depose Rodgers if the defendants would not simultaneously produce the requested documents. The union defendants' attorney agreed to try to arrange a different date for the Rodgers' deposition although the plaintiffs' attorney contends he did not expressly agree to cancel the July 18, 1986 deposition. The attorneys had subsequent negotiations about rescheduling the deposition but ultimately, the plaintiffs' attorneys appeared for the deposition and neither Rodgers nor a designee of UAW did appear.

On the scheduled deposition date, the union defendants moved for a protective order against sanctions for their failure to appear and on August 1, 1986, the plaintiffs filed a motion requesting sanctions. These motions fail to comply with N.D. Ind. Rule 7(e) which states that

> the court will refuse to rule on or will deny any and all motions related to discovery unless moving counsel refers to this rule and state in the motion that, after personal meeting and consultation and sincere attempts to resolve differences, counsel are unable to reach an accord. This statement shall recite, in addition, the date, the time, and the place of such personal conference, and the names of all individuals attending.

The parties conduct in this discovery matter evidences a complete lack of any sincere attempts to resolve differences. Thus, they have failed to adhere to the letter, as well as the intent, of N.D. Ind. Rule 7(e) and the Motion for Protective Order and Motion for Sanctions will be DENIED.

II.

The plaintiffs have also filed a Motion to Shorten Time Within Which Defendants UAW and The Budd Company Must Produce Document in Response to Plaintiffs' Deposition Notices. Because this motion also fails to comply with N.D. Ind. Rule 7(e), it will likewise be DENIED.

III.

The union defendants have filed a Renewed Motion to Compel Answers to Interrogatories referring to Rule 7(e) and stating that the union defendants met with the plaintiffs in order to obtain responses to Interrogatories 4 and 8(c) of union defendants' interrogatories to plaintiffs. At the meeting, the plaintiffs voiced no objection to the interrogatories and agreed to answer them but have not yet fulfilled this agreement.

The interrogatories were served on the plaintiffs on August 22, 1985 and by agreement the date for responding was extended to February 20, 1986. The Federal Rules of Civil Procedure require a party on whom interrogatories are served to serve answers or objections within 30 days after service of the interrogatories. Fed.R.Civ.P. Rule 33(a). The plaintiffs have ignored the time limits imposed by the Federal Rules and by their own agreement. Therefore, the union defendants' Motion to Compel Discovery will be GRANTED. At this time the court will DENY the union defendants' request for reimbursement of the expenses of seeking an order to compel discovery. The union defendants are granted leave to renew that request if the plaintiffs fail to comply strictly with the terms of this Order.

IV.

The union defendants have also filed a Renewed Motion to Dismiss, referring to Rule 7(e) and stating that the union

defendants met with the plaintiffs in order to obtain their responses to the union defendants' interrogatories. At the meeting, counsel for the plaintiffs assured the union defendants that the responses of plaintiffs Howard Donald, Lillie Donald, Carolyn Gilbert, Curtis Humphrey, L.M. Jackson, Leon Jenkins, Bennie Kennedy, Ronald Leggett, Melvin Montgomery, and Jerome Nedoff would be immediately forthcoming. Despite this assurance, these plaintiffs have not yet answered the interrogatories.

The interrogatories were served on the plaintiffs on August 22, 1985 and by agreement the date for responding was extended to February 20, 1986. As stated above, the Federal Rules require answers or objections to interrogatories within 30 days after service of the interrogatories. Fed.R.Civ.P. Rule 33(a).

Fed.R.Civ.P. Rule 37(d) permits this court to impose sanctions on a party for failure to serve answers or objections to interrogatories after proper service of the interrogatories. Available sanctions include an order striking out pleadings or dismissing the action. Fed.R.Civ.P. Rule 37(b)(2)(c) and (d). The court has wide discretion in the imposition of appropriate sanctions. *Ntl. Hockey League v. Metropolitan Hockey Club*, 427 U.S. 639 (1976). "[T]he most severe in the spectrum of sanctions provided by statute or rule must be available to the District Court in appropriate cases, not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent." *Ntl. Hockey League*, 427 U.S. at 643.

The court finds it appropriate under these circumstances to dismiss the claims of the recalcitrant parties. The discovery cut-off date is set as September 1, 1986 and an order merely compelling the plaintiffs to answer entire sets of interrogatories would prejudice the union defendants by leaving them with inadequate time to conduct follow-up discovery. Therefore, dismissal is the only effective remedy remaining.

CONCLUSION

Because of noncompliance with N.D. Ind. Rule 7(e), the Union Defendants' Motion for Protection Order, the plaintiffs' Motion for Sanctions, and the plaintiffs' Motion to Shorten the Time are DENIED.

The Union Defendants' Renewed Motion to Compel Answers to Interrogatories is GRANTED. Plaintiffs Henry C. Adams, Jr., Willie Ballard, Robert Bernal, George Berry, Willie Bingham, Joyce Clark, Willie J. Cornelius, Joseph Cruz, Louis Cruz, Jr., Michael Dawson, Melvin R. Page, John W. Perkins, Willie H. Smith, Malcolm Tucker, Jerome Tyron, Robert Walker, Sr., Robert Weems, Emanuel Williams, Leroy Williams, Milton Wilson and Alfred D. Volk to answer interrogatories 4 and 8(c) within five days of receipt of this Order.

The Union Defendants' Renewed Motion to Dismiss is GRANTED. The claims of plaintiffs Howard Donald, Lillie Donald, Carolyn Gilbert, Curtis Humphrey, L.M. Jackson, Leon Jenkins, Bennie Kennedy, Ronald Leggett, Melvin Montgomery, and Jerome Nedoff against the union defendants are hereby DISMISSED WITH PREJUDICE.

ENTER: August 15, 1986

s/ Hon. James T. Moody

JUDGE, UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

HENRY C. ADAMS, JR., et al., Plaintiffs	:	
v.	:	CIVIL NO. H 85-556
THE BUDD COMPANY, et al., Defendants	:	

ORDER

This matter comes before the court on the plaintiffs' Motion to Amend, Alter or Vacate the Court's Order of August 21, 1986, Which Dismissed Certain Plaintiffs as to the Union Defendant, and a Request for Leave of Court to File Answers to Union Defendant's First Interrogatories as to Certain Plaintiffs' which motion was filed on August 29, 1986. On August 21, 1986, the court granted the defendants' motion to dismiss the claims of Howard Donald, Lillie Donald, Carolyn Gilbert, Curtis Humphrey, L.M. Jackson, Leon Jenkins, Bennie Kennedy, Ronald Leggett, Melvin Montgomery, and Jerome Nedoff against the union defendants. The court found that the union defendants had served the plaintiffs with interrogatories on August 22, 1985, and, as of August 21, 1986, these plaintiffs had not yet responded. Therefore, the court dismissed the claims of these plaintiffs against the union defendants pursuant to Fed.R.Civ.P. Rule 37(d).

The plaintiffs now ask the court to vacate the dismissal and allow them leave of court to answer the interrogatories. The plaintiffs have offered a panoply of common excuses for failing to comply with discovery requests. None of the excuses justifies their recalcitrant conduct and hence the judgment of dismissal is warranted.

CONCLUSION

For reasons discussed above, the plaintiffs' Motion to Amend, Alter or Vacate the Court's Order of August 21, 1986 Which Dismissed Certain Plaintiffs as to the Union Defendants, and Request for Leave of Court to File Answers to Union Defendant's First Interrogatories as to Certain Plaintiffs are DENIED.

ENTER: September 23, 1986

s/ Hon. James T. Moody

JUDGE, UNITED STATES DISTRICT COURT